STATE OF MICHIGAN

IN THE SUPREME COURT

JOYCE McDOWELL, a Formal Special Personal Representative Intestate of the Estates of BLAKE BROWN, decease JOYCE BROWN, deceased, CHRISTOPHER BROWN, deceased, NAOMI FISH, deceased, JOHNNY C. FISH, deceased, JERMAINE FISH, deceased , as Special Conservator of JONATHAN FISH, a minor and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, adults,

Plaintiffs-Appellees/Cross-Appellants,

v.

CITY OF DETROIT, individually and acting by and through the DETROIT HOUSING COMMISSION,

Defendants-Appellants/Cross-Appellees.

Supreme Court No. 127660

Court of Appeals No. 246294

Wayne Circuit Court
Case No. 00-039668-NO

127660
Sykes

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PLAINTIFFS' SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANTS' APPLICATION FOR LEAVE OR OTHER PEREMPTORY ACTION

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Introduction

Undersigned counsel was at the Supreme Court on another matter on October 19, 2005, and went to the Clerk's counter and asked to speak with Chief Clerk Corbin Davis about filing this Supplemental Brief a short period after Appellants' Supplement was filed. The Clerk at the counter said that rather than talk with Mr. Davis, undersigned should simply file the 14-day extension motion. Counsel did so on October 20, 2005.

Now, on October 27, 2005, Appellants filed an Answer to that Motion, with appellate counsel Gross alleging "gamemanship" by Plaintiffs. Undersigned counsel makes this crystal clear to opposing counsel. Appellee does not care if Mr. Gross, like a petulant child, "must" have the last word. Mr. Gross can file a hundred supplemental briefs to have his "last word" if he wants and if this Court is willing to allow it.

Appellees' Supplemental Response is submitted to inform and persuade this Court, not for some malevolent "sporting purpose," or to exacerbate Appellants' counsel's obviously already overflowing suspicion and paranoia. Appellees' counsel has followed the Court's September 23, 2004 admonition to "avoid submitting a mere restatement of arguments in application papers." Submitted herewith is Appellees' Supplemental Response.

Law and Argument

I. Plaintiff Has Stated An Actionable Claim For Nuisance That Avoids Governmental Immunity Based On Defendants' Violation Of Three Statutes Enacted Long Before 1964 To Preserve Public Health, Safety And Welfare Which Establish The Existence Of A Public Nuisance.

This Court's September 23, 2005 Order granting oral argument on whether to grant

the application or take other peremptory action ordered the parties to address "whether the Court of Appeals erred in holding that negligent nuisance is an exception to governmental immunity under Hadfield v Oakland County Drain Commissioner, 430 Mich 139 (1988)... ." Based on Hadfield, the Court of Appeals did err by declaring that "negligent" nuisance is an exception to governmental immunity. Nevertheless, the Court's error in categorizing the electrical defect that led to the fatal fire as a "negligent nuisance" should not be dispositive of Plaintiffs' nuisance exception claim.

In the confusing "dust bin" that is nuisance law improperly pigeonholing or categorizing an activity as a particular type of nuisance occurs all too frequently. Plaintiffs submit that here the nuisance in this case amounts to what the Hadfield Court described as "a form of public nuisance that would be directly analogous to trespass-nuisance." 430 Mich at 170. The Court of Appeals panel in this case overlooked the fact that the Hadfield Court did reject a "negligent" nuisance exception to governmental immunity:

> "There is no pre-1964 case law that recognizes or applies either an intentional or a negligent nuisance exception, in any form." Id.

The Court of Appeals lapse in missing this statement in Hadfield does not, however, mean that its specific finding of a valid nuisance exception under the facts presented is also erroneous. Earlier in Hadfield, the Court discussed the fact that in Michigan, public nuisance is governed by statute and by common law. Hadfield, 430 Mich at 152. Quoting Attorney General v Peterson, 381 Mich 445, 465 (1969), the Hadfield Court goes on to state:

> "'At common law, acts in violation of law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare.'" Id.

In a footnote, the Hadfield Court reiterated that, "Whether there exists a limited public

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nuisance exception, analogous to trespass-nuisance but without the private property interest, remains an open question." 430 Mich at 152, n 6. This case involves a limited public nuisance exception like the one theorized in Hadfield except that here, there is also a private property interest based on Jo-Ann Campbell's leasehold possession. The facts of this case, perhaps uniquely, fit into both the pre-GTLA nuisance exception and the trespass-nuisance exception because of the private property interest in the premises that Jo-Ann Campbell and her guests had as tenants of the Detroit Housing Commission.

Later in its opinion, the Hadfield Court suggested that Pound v Garden City School Dist, 372 Mich 499 (1964) may have presented a public nuisance that came within the nuisance exception. Pound involved ice on a public sidewalk created by improper drainage from school property. The Pound Court analogized the case to the trespass-nuisance case, Ferris v Bd of Ed, 122 Mich 315 (1899) because the injury occurred while plaintiff was outside the limits of defendant's premises. On that basis, the late Justice Brickley, for the Hadfield majority said that Pound "might be used as the basis for an argument that a form of public property, should be included within the historically recognized exception. The Court declined to address this question because none of the four cases presented in Hadfield were analogous to Pound.[1] Again, the present case is slightly different from Pound because the six deaths in this case occurred inside the premises and resulted from Defendants' substantial and unreasonable interference with Plaintiff's right to quiet enjoyment of the premises.

---

[1] This Court later considered the viability of the nuisance exception again in Li v Feldt (After Second Remand), 439 Mich 457 (1992), but again concluded that on the facts, Li (improperly timed traffic light) and its companion case Garcia (child drowning in retention pond) did not present colorable nuisance claims.

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Plaintiffs here submit that even if the Court of Appeals got this confusing area of the law wrong by declaring that the current facts presented a cognizable "negligent" nuisance, this Court should nonetheless, under the facts presented, find a nuisance exception under a form of public nuisance. As set forth in Plaintiffs' original Response, the nuisance claim is predicated upon Defendants' violation of three public safety, health and welfare statutes, MCL 554.139 of the Real Property Code, MCL 125.539 of the Michigan Housing Law, and MCL 29.23 of the Fire Prevention Code. Each of these three statutes have common law roots and statutory bases which long predate 1964.

MCL 554.139 was added as §39 by PA 1968, No 295 §1 to the General Provisions Concerning Real Estate in RS1846, c. 66. The predecessor statute to §39 is contained in the 1917 Michigan Housing Code (PA 1917, No 167 §71), MCL 125.471, which, as to repairs, still requires that **"Every dwelling and all parts thereof including plumbing, heating ventilating and electrical wiring shall be kept in good repair by the owner ... ."** Eighty years ago, this Court interpreted that statute as requiring a landlord to keep the premises in repair. Annis v Britton, 232 Mich 291, 293-294 (1925).

Likewise, MCL 125.539 defining 'dangerous building' was amended in 1992 by PA No 113, but it too is part of the 1917 Michigan Housing Law. Subsections (f) and (g) from the 1992 revision which are set forth in Plaintiffs' February 21, 2005 Response are, for all relevant purposes, substantially the same as the historical pre-1964 version of subsections (f) and (h). Additionally, MCL 29.23 was promulgated by PA 1941 No 207.

As Plaintiffs pointed out in their opening Response, this Court recently recognized that a violation of the Michigan Housing Law statute is a nuisance per se. Although the Court of

Appeals mistakenly misspoke in terms of "negligent" nuisance which the Hadfield case specifically rejected, the panel correctly found a legally cognizable nuisance exception to governmental immunity. Even if it is necessary for this Court to disavow that part of the Court of Appeals decision regarding "negligent" nuisance, the opinion correctly recognizes that Plaintiff has pleaded a nuisance that is an exception to governmental immunity under the pre-1964 law. Accordingly, the November 9, 2004 Court of Appeals opinion is sound in all other respects and the Court of Appeals panel should otherwise be affirmed.

II. A Fire That Begins In The Space Between An Inner Wall And Outer Wall Of Leased Premises "Trespasses" To The Tenant's Premises When It Spreads Beyond The Inner Wall.

This Court's September 23, 2005 Order also directed the parties to address "whether, if a fire begins in the space between an inner and outer wall of leased premises, the fire "trespasses" to the tenant's premises when it spreads beyond the inner wall." Appellants have offered the Court no authority squarely addressing this question in their Supplemental Brief, and beyond the "fire" trespass cases Appellees provided to their Court in the original Response, Appellees have found no specific caselaw.

But, rather than trying to answer the question, Defendants' Supplement instead simply launches off into the erroneous argument that Defendants were not in possession of the interstitial space within the demised premises. Without belaboring the point, this strawman "issue" is not in serious dispute under the Lease or the law. Section VII of the Lease, "Obligations And Rights Of Parties" states in subsection 1(a) and (c) that Management (i.e. Defendants) agree to

(a) Repair and maintain the dwelling unit, electrical and appliances, and

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the common areas and facilities which are needed to keep the housing in decent, safe and sanitary condition.

* * *

(c) Keep development, buildings, facilities **and common areas, not otherwise assigned to Residents for maintenance and upkeep**, in a clean and safe condition (Defendants' Exhibit A: Lease).

By contrast, Section VII(B)(1)(g), (l) of the July 22, 1999 Lease executed by Jo-Ann Campbell precludes all waste by "Residents, Residents Household and Guests," stating that they are :

(g) To make no alterations or repairs or redecoration to the interior of the Premises ...

* * *

(l) To notify Management promptly of known need for repairs to the dwelling unit, and known **unsafe conditions in common areas** and grounds of the site which may lead to damage or injury.

(Defendants' Exhibit A: Lease).

Thus, reading these provisions together, the subject Lease makes it absolutely clear that the lessee's right of possession is limited to the inside of the bare walls of the unit. The Lease is even more restrictive than many leases because it forbade any redecoration, let alone repairs, **even to the inside of those bare walls**. Clearly, the only duty the lessee had was to **notify** Defendants of the need for repairs in the common areas which, by the terms of the Lease, certainly included the interstice between the inner and outer walls where the fire originated. Jo-Ann Campbell satisfied this provision by repeatedly complaining before the fire about electrical problems in the unit.

With respect to the law, in addition to the cases discussed in Plaintiffs' Response, the Court is directed to Restatement 2d of Property: Landlord & Tenant §17.4 which provides:

§ 17.4 Parts of Leased Property Retained in Landlord's Control Necessary

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to Safe Use of Part Leased.

> **A landlord who leases a part of his property and retains in his own control any other part necessary to the safe use of the leased part, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon that part of the property retained in the landlord's control, if the landlord by the exercise of reasonable care could have:**
>
> **(1) discovered the condition and the risk involved; and**
> **(2) made the condition safe.**

See also Restatement 2d Torts §360.

Thus, Defendants' argument in their Supplemental Brief that "the fire started on the tenant's premises" is patently without merit.

Moreover, the trial court and the Court of Appeals correctly found that Plaintiffs unequivocally pleaded and set forth facts to establish a trespass-nuisance claim cognizable under Hadfield, the cases discussed in Hadfield, and in its progeny. While this Court in Pohutski v City of Allen Park, 465 Mich 675 (2002), prospectively overruled Hadfield, this case predates Pohutski and fits precisely within the Hadfield line of authority. Presumably, this Court will not overrule Pohutski's "prospective only" application. Responding to the question actually posed in the Court's September 23, 2005 Order, Plaintiffs reiterate that both logic and common sense establish that fire that spreads from the space behind the inner wall into leased premises does amount to a "trespass."

In addition to the Michigan cases in Plaintiffs' original Response that unequivocally establish that a fire that spreads onto a plaintiff's property is a trespass, other jurisdictions are also in accord with this proposition. See Zimmer v Stephenson, 403 P2d 343, 345 (Wash 1965) [actionable trespass where adjacent landowner's tractor set

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plaintiff's field of wheat on fire]; Martin v Union P.R. Co, 474 P2d 739, 739-740 (Ore 1970) [spread of fire from defendants' land onto plaintiffs' land an intrusion sufficient to constitute a trespass]; Koos v Roth, 652 P2d 1255, 1267-68 (Ore 1982) [same]; Elton v Anheuser-Busch Beverage Group, Inc, 50 Cal App 4th 1301, 58 Cal Rptr 2d 303, 306-407 (1996) [liability for adjacent landowner's controlled burn that went awry]; Robinson v United States, 175 F Supp 2d 1215, 1222 (ED Cal 2001) ["controlled" fire that escaped and damaged landowner's property a trespass].

It is true that in Adams v Cleveland-Cliffs Iron Company, 237 Mich App 51, 69-71 (1999), the Court of Appeals held that noise or vibrations or dust are intangible objects that are not actionable in trespass. But, just as an overflow or an escape of water can be a trespass-nuisance, so too can a fire. Even under the older "direct" and "substantial" test, fire is a trespass because it can be seen with the naked eye. Clearly, under Restatement 2d of Torts §158, Comment i, fire is a tangible, visible thing that was "propelled" or "placed" on Plaintiffs' property under the circumstances presented. Under the facts of this case, it is simply beyond peradventure that the fire "trespassed" to the tenant's premises and not only destroyed Jo-Ann Campbell's possessory interest in those premises, but it also tragically took the lives of six young children and left two other people seriously injured. The trial court and the Court of Appeals properly denied summary disposition on Plaintiffs' trespass-nuisance claim which pleads in avoidance of governmental immunity.

Relief Requested

For the reasons set forth here and in Plaintiffs' earlier Response, the Court of Appeals properly affirmed the trial court's denial of governmental immunity based

summary disposition on Plaintiffs' nuisance and trespass-nuisance claims. The Court should deny leave or other peremptory relief and permit this case to proceed to settlement/ trial in the Wayne Circuit Court.

Respectfully submitted,

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